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STATUTE

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IN THE

Supreme Court of the United States

October Term, 1953

No. 741.

CHARLES BEYERBACH, as a stockholder of Juno Oil Co., a Nevada corporation,

Appellant,

vs.

JUNO OIL CO., a Nevada corporation; MAURICE HENDERSON and VIOLET V. CARPENTER, as administratrix of the Estate of Scott Carpenter, deceased,

Appellees.

BRIEF OF APPELLANT OPPOSING MOTION TO DISMISS OR AFFIRM.

Appellant respectfully submits the following brief in opposition to appellees' motion to dismiss his appeal or to affirm the judgment of the Supreme Court of the State of California.

I.

Appellees Have Not Correctly Stated the Issue on This Appeal.

Appellees state the issue as follows:

> "The question sought to be presented in this appeal is appellant's claim that Section 834 of the Corporations Code of the State of California is unconstitutional insofar as said section requires that a plaintiff in a derivative action furnish security for the expenses of individual defendants." (Statement, etc., pp. 1-2.)

The statement is incomplete and misleading, in that it does not contain the essential element that the "individual defendants" are not officers or directors or employees of the corporate defendant.

The issue is thus stated in the majority opinion of the California Supreme Court:

> "He (appellant) contends that the applicable portions of section 834 are unconstitutional, particularly in their requirement that plaintiff furnish security for the expenses of individual defendants *who are sued not as officers or employees of defendant corporation but as third persons who dealt with the corporation.*"
>
> [*Beyerbach v. Juno Oil Co.*, 42 A. C. 11, 15 (265 P. 2d 1).] (Italics added.)

In the dissenting opinion of Associate Justice Jesse W. Carter (which is appended hereto),* the issue is similarly described as follows:

> "It is my considered opinion that certain portions of section 834 of the Corporations Code, as applied here, are unconstitutional, particularly the requirement that plaintiff shareholder in a derivative suit furnish security for the expenses of individual defendants who are sued, *not as officers or employees of defendant corporation, but as third persons who dealt with the corporation.*"
>
> (*Beyerbach v. Juno Oil Co.* (*supra*), p. 28.) (Italics added.)

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*We have taken the liberty to include as an appendix hereto, the entire dissenting opinion of Justice Carter since it contains most compelling reasons for this Court to deny the motion of appellees for a dismissal or affirmance.

II.

The State Court Decision Is Not Based Upon an Adequate or Independent Non-Federal Ground.

Appellees contend that the action was properly dismissed as against the corporate defendant and that consequently the action against the other defendants must fail. The *sine qua non* of appellees' contention on this point is that appellant's suit against the corporate defendant and his suit against the individual third-party defendants are inseparable. The essential premise of the reasoning employed is that appellant's action cannot proceed against the third-party defendants without proceeding at the same time against the corporate defendant.

By the same token, appellant could not have proceeded against the corporate defendant without proceeding at the same time against the individual third-party defendants.

The action having been instituted for the benefit of the corporate defendant, it is a defendant *in name* only, since it actually is the *real party in interest* insofar as the prosecution of the action against the other defendants is concerned. To have furnished security for costs and attorneys' fees to the corporate defendant alone, would have accomplished nothing. It would have been an idle act.

Although we raised this point before the California Supreme Court concerning the indivisibility of appellant's suit and the utter futility of furnishing such security to the corporate defendant without furnishing like security at the same time to the third-party defendants, the point was not decided in the majority opinion and decision of

that Court. We had specifically called the Court's attention to the indisputable fact that the furnishing of security to the corporate defendant alone would have been an idle act, and we cited Section 3532 of the California Civil Code which provides that

"The law neither does nor requires idle acts."*

The only mention of the point relating to this maxim of jurisprudence is in the dissenting opinion of Justice Carter, who concurred with the views expressed by us above, as follows:

> "The majority seems to feel that it is not essential to make a complete study of this constitutional question as is illustrated by the following statement: '. . . regardless of the propriety of the order requiring deposit of security for the individual defendants, the judgment of dismissal is, for another and independent reason, the only proper judgment here. Plaintiff failed and refused to furnish the security for the corporation as ordered. . . . Therefore, when plaintiff refused to deposit the security required for the corporation, the action could not continue against that indispensable party, or in its absence against any other party, and the trial court had no alternative but to dismiss as to all defendants.'

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*In *Robinson v. Puls*, 28 Cal. 2d 664, 667, 171 P. 2d 430, the California Supreme Court applied the maxim to an analogous situation, as appears from the following quotation from that decision:

> "Defendant also contends that plaintiffs waived a jury by reason of their failure to deposit jury fees 10 days prior to the day set for trial, as required by subdivison 5 of section 631. The order denying plaintiffs' demand for a jury was made more than 45 days prior to the date set for trial. Plaintiffs having been refused a jury were not thereafter required to deposit fees for a jury trial which had been denied them. The law does not require the performance of an idle act. (Civ. Code, §3532.)"

> This argument is misleading as it overlooks the fact that even if plaintiff had posted security for the corporation he still would not have been able to proceed against the other defendants without first furnishing the security prescribed as to them. In view of this and the fact that grave questions of constitutionality were involved, plaintiff appears to have followed a proper course of action by appealing from the order of dismissal."

From what has been said above, it is obvious that the requirement that appellant furnish security for expenses to the corporate defendant was not *independent* of the requirement that he furnish like security to the third-party defendants. Insofar as the statute in question is held by the California Supreme Court to apply to third-party defendants, the order requiring appellant to furnish security to the defendants was an indivisible order, differing only in the respective amounts of security to be furnished.

Had the trial court made an order that appellant furnish security *only* to the corporate defendant, then the failure to furnish such security might have been fatal, because appellant could have proceeded against *all* defendants by furnishing security to the corporation alone.

With reference to our contention that the furnishing of security to the corporation alone would have been an idle act, the following quotation, in which two decisions of this Court are cited, seems peculiarly applicable.

> "I cannot accept such a construction of the 1905 Act. The law does not require the doing of useless acts. Legislation should not be read in such a spirit of mutilating narrowness.
>
> *United States v. Hutcheson, et al.*, 312 U. S. 219, 235, 61 S. Ct. 463, 85 L. Ed. 788.

> The Court should view an act of Congress with the idea of giving hospitable scope to its purpose. *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U. S. 381, 391, 59 S. Ct. 516, 83 L. Ed. 784."
>
> (*United States v. Big Ben Transit Co., et al.*, 42 Fed. Supp. 459, 468.)

When we consider the fact that the California Supreme Court *intended* to decide the question of the constitutionality of the statute insofar as it applied to third-party defendants, that it actually *did determine* that the statute when applied to such third-party defendants, was not in conflict with the Federal Constitution, and that *the decision* of that court, if permitted to stand, *will be cited universally as the only authority* on the precise question which is here involved, the purported non-federal ground, involving as it does the doing of an idle act, at once appears in its true light as being "without any fair or substantial support" for the decision of the state Supreme Court.

This Court has held that under such circumstances it will exercise its jurisdiction to determine whether a federal right was denied, or not given due recognition. In *Ward v. Board of Love County Commissioners*, 253 U. S. 17, 22, 40 S. Ct. 419, 64 L. Ed. 751, this Court held as follows:

> "The right to the exemption was a federal right, and was specially set up and claimed as such in the petition. Whether the right was denied, or not given due recognition, by the Supreme Court is a question as to which the claimants were entitled to invoke our judgment, and this they have done in the appropriate way. It therefore is within our province to in-

quire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward nonfederal grounds of decision that were without any fair or substantial support. Union Pacific R. R. Co. v. Public Service Commission, 248 U. S. 67, 39 Sup. Ct. 24, 63 L. Ed. 131; Leathe v. Thomas, 207 U. S. 93, 99, 28 Sup. Ct. 30, 52 L. Ed. 118; Vandalia R. R. Co. v. South Bend, 207 U. S. 359, 367, 28 Sup. Ct. 130, 52 L. Ed. 246; Gaar, Scott & Co. v. Shannon, 223 U. S. 468, 32 Sup. Ct. 236, 56 L. Ed. 510; Creswill v. Knights of Pythias, 225 U. S. 246, 261, 32 Sup. Ct. 822, 56 L. Ed. 1074; Enterprise Irrigation District v. Farmers' Mutual Canal Co., 243 U. S. 157, 164, 37 Sup. Ct. 318, 61 L. Ed. 644. And see Jefferson Branch Bank v. Skelly, 1 Black 436, 443, 17 L. Ed. 173; Huntington v. Attril, 146 U. S. 657, 683, 684, 13 Sup. Ct. 224, 36 L. Ed. 1123; Boyd v. Thayer 143 U. S. 135, 180, 12 Sup. Ct. 375, 36 L. Ed. 103; Carter v. Texas, 177 U. S. 442, 447, 20 Sup. Ct. 687, 44 L. Ed. 839."

The decision in the *Ward* case is cited in the later case of *Lawrence et al. v. State Tax Commission of State of Mississippi*, 286 U. S. 276, 52 S. Ct. 556, 76 L. Ed. 1102, 87 A. L. R. 374, where the following language appears:

"But the Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked. Even though the claimed constitutional protection be denied on nonfederal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus avoided.

See Ward v. Love County, 253 U. S. 17, 22, 40 S. Ct. 419, 64 L. Ed. 751; Enterprise Irrigation District v. Canal Company, 243 U. S. 157, 164, 37 S. Ct. 318, 61 L. Ed. 644; Fox River Paper Co. v. Railroad Commission, 274 U. S. 651, 655, 47 S. Ct. 669, 71 L. Ed. 1279."

* * * * * * * *

"The burden does not rest on him to test again the validity of the amendment by some procedure to compel his competitors to pay the tax under the earlier statute. Iowa-Des Moines National Bank v. Bennett, *supra*, page 247 of 284 U. S., 52 S. Ct. 133. See Cumberland Coal Co. v. Board of Revision, 284 U. S. 23, 52 S. Ct. 48, 76 L. Ed. 146. We therefore conclude that the purported nonfederal ground put forward by the state court for its refusal to decide the constitutional question was unsubstantial and illusory, and that the appellant may invoke the jurisdiction of this Court to decide the question."

The following conclusion reached by this Court in *Terre Haute & Indianapolis Railroad Company v. State of Indiana, etc.*, 194 U. S. 579, 24 S. Ct. 766, 769, 48 L. Ed. 1124, is likewise applicable to the instant situation:

"The case then stands thus: The state court has sustained a result which cannot be reached, except on what we deem a wrong construction of the charter, without relying on unconstitutional legislation. It clearly did rely upon that legislation to some extent, but exactly how far is left obscure. We are of opinion that we cannot decline jurisdiction of a case which certainly never would have been brought but for the passage of flagrantly unconstitutional laws, because the state court put forward the untenable construction more than the unconstitutional statutes

in its judgment. To hold otherwise would open an easy method of avoiding the jurisdiction of this court. Louisville Gas Co. v. Citizens' Gaslight Co., 115 U. S. 683, 697, 29 L. ed. 510, 516, 6 Sup. Ct. Rep. 265."

In the light of these pronouncements by this Court, it is obvious that the state court decision is not based on a substantial or independent non-federal ground.

III.

A Substantial Federal Question Is Presented by This Appeal.

Appellees state in their brief (p. 8):

> "The Supreme Court has repeatedly held that where the federal question raised by appellant has been *explicitly* decided by it, he is bound by the principles enunciated in prior decisions, and the federal question relied upon is deemed to be devoid of any substantial merit." (Italics added.)

The constitutionality of the statute as applied to third-party defendants who are not officers or directors or employees of the corporate defendant, has never been decided *explicitly* by this Court. A conclusive answer to the contentions of appellant on this point is contained in the dissenting opinion of Justice Carter, and the following excerpt therefrom is particularly applicable:

> "The majority recognizes the fact that this precise question has never yet been decided, as it states: 'However, inasmuch as some of the particular aspects of plaintiff's arguments as to the constitutionality of a provision for security for and possible indemnification of an individual defendant who is not sued as an officer or employe of a corporation appear to

be advanced in this case for the first time we give specific consideration to those aspects of his arguments.' In spite of this, the majority opinion proceeds to merely gloss over the issue by inadequately discussing the principal constitutional objection and then saying: 'Fundamentally, plaintiff's arguments as to constitutionality are answered, either directly or by necessary implication, by Cohen v. Beneficial Industrial Loan Corp. . . .' Following this statement it admits that the New Jersey statute, involved in the Cohen case, '(. . . so far as appears, . . . contained no provision as to, and the opinion does not discuss, individual defendants who were officers or employes) . . .'

In the case of Cohen v. Beneficial Industrial Loan Corp., *supra*, 337 U. S. 541, the United States Supreme Court upheld a statute requiring security to be posted for the corporation when a shareholder brings a representative suit. The court there held that such a classification was a proper one since the shareholder can be required by state legislation to protect the corporation he seeks to represent. It said: 'And while the stockholders have chosen the corporate director or manager, they have no such election as to a plaintiff who steps forward to represent them. He is a self-chosen representative and a volunteer champion. The Federal Constitution does not oblige the state to place its litigating and adjudicating processes at the disposal of such a representative, at least without imposing standards of responsibility, liability and accountability which it considers will protect the interests he elects himself to represent. (Emphasis added.) Thus it would appear that it may be proper for a state to require a stockholder plaintiff to protect the interests he is representing

> by posting security, but this cannot be construed to mean that he is to protect all interests including the third party defendants against whom he proceeds. The majority also cites Hogan v. Ingold, 38 Cal. 2d 802 [243 P. 2d 1], as answering "either directly or by necessary implication" plaintiffs arguments as to the constitutionality of section 834 but it follows this by saying: "(in which the problem as to such individual defendants did not arise)." ' "

The importance of the question involved here is not less than the importance of the question originally determined by this Court in the *Cohen* case. The instant decision of the California Supreme Court makes the present inquiry by this Court doubly important and vitally necessary, for that decision ascribes to the decision in the cited case meaning and legal effect, which was never intended by this Court.

Conclusion.

For the reasons stated above, the motion of appellees to dismiss appellant's appeal or to affirm the judgment and decision of the Supreme Court of the State of California, should be denied.

Respectfully submitted,

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